No. 20480

IN THE
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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JOHN N. NEWLAND, Trustee in Bankruptcy for HUGHES HOMES, INC., a Montana Corporation and HUGHES HOMES ACCEPTANCE CORPORATION, an Idaho Corporation,

Appellant,

vs.

WINCEL T. EDGAR and HELEN E. EDGAR, Husband and Wife,

Appellees.

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# BRIEF OF APPELLANT

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Appeal from the United States District Court for the

District of Idaho, Northern Division

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## JURISDICTION

This action originated in the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Bonner. Plaintiffs were Wincel T. Edgar and his wife. Hughes Homes, Inc., a Montana corporation was defendant. The complaint sought to establish a note secured by a mortgage covering Idaho property as usurious and to have the same cancelled and money judgment rendered as statutory penalties (R. 10-13).

Hughes Homes, Inc., was the original mortgagee and had assigned the note and mortgage to Hughes Homes Acceptance Corporation (Def. Exs. 2 & 3).

John N. Newland was and is trustee for both of said corporations

(Anaconda Building Materials v. Newland, 9th Cir., 336 F2d 625; R. 26). The Trustee petitioned for removal of the cause to the United States District Court for the District of Idaho, Northern Division (R.4-6) and intervened (R.27).

The United States District Court held it had jurisdiction under the provisions of the Bankruptcy Act, 11 U.S.C.A., Sec. 1 et seq. (R.49).

Jurisdiction of the lower court exists by virtue of 11 U.S.C.A., Sec. 11 (20).

Judgment was entered in favor of plaintiffs and against the trustee in his official capacity for both corporations July 19, 1965, (R. 56-58) and on August 17, 1965, Notice of Appeal to the United States Court of Appeals for the Ninth Circuit was filed by the trustee.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C.A. Sec. 1291 and 1294.

## STATEMENT OF THE CASE

### The Issues

Appellees, Wincel T. Edgar and Helen E. Edgar, husband and wife, filed a suit in the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Bonner, against Hughes Homes, Inc., a Montana corporation, (R.10-21, 18-21) and the cause was removed to the District Court of the United States for the District of Idaho, Northern Division, upon petition for removal (R. 4-6) of John N. Newland,

as Trustee in Bankruptcy of Hughes Homes, Inc. (R.46), and said John N. Newland, as Trustee in Bankruptcy of Hughes Homes Acceptance Corporation, an Idaho corporation, (R.46) intervened as defendant and cross-complainant (R.25-27; 36-44).

The Appellees' complaint sought against Hughes Homes, Inc., a judgment (based upon alleged usury and the penalties of an Idaho statute) forfeiting the 10% interest reserved, plus twice the amount of interest reserved, setting the forfeitures off against the remaining principal balance, cancelling the mortgage security and rendering a money judgment in favor of Appellees (R. 11-13).

In answer to the complaint, Hughes Homes, Inc., denied the usury, alleged that Washington law, which permits 12% interest, governed the entire transaction, that only 8%, which is legal in Idaho, was collected and charged, and alleged assignment of the debt and security to Hughes Homes Acceptance Corporation (R. 28-30).

Hughes Homes Acceptance Corporation answered the complaint, denying the usury and averring that the transaction was accomplished in the State of Washington (R.36-38). Hughes Homes Acceptance Corporation cross-complained for foreclosure of the mortgage as assignee thereof (R. 38-44), seeking the unpaid balance of principal and accrued interest at 8% per annum.

The cause was tried to the court sitting without a jury (R.49), the Memorandum Opinion (R. 49-55) constituted Findings of Fact and Conclusions of law and Decree was entered in favor of appellees, the

plaintiffs (R. 56-58).

In arriving at the Decree, the Court concluded that neither Washington nor Montana law, the places of execution and performance, respectively, of the note and security instrument, were applicable (under the law of either such state, the contract would not be usurious (R.52); concluded that an intent existed to evade the usury laws of Idaho (R.54-55), and that the Idaho law with its penalty statute must be applied (R.52-53) against Newland in his capacity as trustee for both corporations (R.58).

Many of the trial court's findings of fact, the conclusions of law, and the judgment based thereon, are contended to be erroneous on this appeal.

## Questions Involved and the Manner in Which They are Raised

1. Whether appellees established by substantial evidence that: (a) appellant attempted to evade the Idaho usury statute; and (b) the parties did not intend that Washington law should govern the transaction. These and related findings and incidental questions are involved and result from the allegations of plaintiffs' complaint, wherein Hughes Homes, Inc., as defendant, was charged with violating the Idaho statute against usury (R. 11-13), the answer of Hughes Homes, Inc., defendant, denying the usury and alleging the transaction was governed by Washington law and alleging that only 8% interest was ever charged (R.28-31), and the answer and cross-complaint of John N. Newland, as

trustee for Hughes Homes Acceptance Corporation, which denies the usury and seeks judgment for the unpaid principal and accrued interest at 8% per annum after applying all payments first to accrued interest at 8% per annum and the balance to principal, and seeks foreclosure of the mortgage (R. 36-44).

2. Whether the conclusions of law which involve the construction by the trial court of Idaho conflict of laws rules and construction of the Idaho usury statute were erroneous, including herein claimed erroneous application of Idaho law to the transaction instead of the law of Washington or the law of Montana through Idaho conflict of laws rules; or in the event Idaho law and the Idaho usury statute properly applied to the transaction, then the erroneous application of the penalties prescribed by the Idaho statute. These and incidental questions are presented by virtue of the case being a diversity action which places in issue and calls for application of Idaho conflict of laws rules with regard to usury (R.52-55).

## The Facts

Hughes Homes, Inc., a Montana corporation, was authorized to do business in Washington, Montana and Idaho (R. 45) and had an agent, a Mrs. Edythe Nelson, a resident of Newport, Washington, a licensed realtor in Washington and Idaho, who represented the corporation in the sale of package or prefabricated homes, and who sold such a home to Edgars for Hughes Homes, Inc. (R.48). At the time of the transaction involving the sale of a prefabricated home by Hughes Homes, Inc., to Edgars, and the financing

thereof through a note representing the purchase price and secured by a mortgage on property in Idaho, Edgars lived about 600 - 700 feet into Idaho from the Washington State line (R.Tr. 6) and from Newport, Washington, which is at the state line (R.Tr. 6), and Edgars' post office address was Box 85, Newport, Washington (Def. Ex. 4).

Mr. Edgar had previously done business with Mrs. Edythe Nelson of Nelson Realty, Newport, Washington (R.Tr. 9-10) when she sold a home for Edgars (R.Tr. 10) and when she sold them a piece of real property in Idaho (R.Tr. 10) upon which there was ultimately erected the prefabricated home which was covered by the mortgage (R.Tr. 9).

Dealings between Nelson and Edgars took place in Washington and in Idaho (R.Tr.7, 10, 12). The contract for the sale and purchase of the prefabricated home, executed for Hughes Homes, Inc., by Edythe K. Nelson for Nelson Realty, seller, and Wincel T. Edgar, buyer, (Def. Ex. No.4) was dated July 6, 1960, and executed at Newport, Washington (R. 46; R.Tr. 12). The contract provided that there be executed in favor of the seller a note and a mortgage or deed of trust securing the same upon the real property upon which the house was to be placed. The contract and the parties provided that delivery of the home be made at Butte, Montana (R.Tr.12-13), which was done (R.Tr.12-13; R. 46).

The note and mortgage were executed July 18, 1960, in a lawyer's office at Newport, Washington (R.46; R.Tr. 7) and the obligation for which the note was issued and the mortgage securing the same given was the cash price of the package home (R.46; Def. Ex. No. 4; R.Tr. 12).

On October 10, 1960, Hughes Homes, Inc., assigned the note and mortgage to Hughes Homes Acceptance Corporation (Def. Ex. No. 3) for valuable consideration (Def. Ex. No. 7; R.Tr. 19). John N. Newland became Trustee of Hughes Homes, Inc., and Hughes Homes Acceptance Corporation, appointed by the U.S. District Court for Montana, under Chapter X of the Bankruptcy Act, in September, 1961 (R.Tr. 14,23; Anaconda Building Materials vs. Newland, 9th Cir., 336 F2d 625). At the time of the assignment to Hughes Homes Acceptance Corporation, one payment had been made, and at the time the asset vested in the trustee, ten payments had been made (Def.Ex. 6; R.Tr. 23).

Defendant's Exhibit No. 6 is a record, originating with the first payment, showing the amount and dates of payments made, date to which interest was computed, amount of payment applied to interest and principal, and balance after such application which was kept and continued as a record of the trustee from and after September, 1961 (R.Tr.14, 18-19, 22).

Hughes Homes, Inc., Hughes Homes Acceptance Corporation and the trustee, Newland, during their respective periods of ownership or control of the note and mortgage, from the time of the first payment to the last one made, applied the payments first to accrued interest at 8% per annum and the balance to principal (R.47; Def.Ex. No.6). The application of the payments to 8% per annum interest was not communicated to Edgars (R.Tr.8).

All of the transactions of Hughes Homes, Inc., about 50 in number, involving sales of packaged homes in Idaho and notes given in payment,

secured by mortgages on Idaho property, involved interest not to exceed 8% (R.Tr. 16-18).

Interest rates of 10% in Montana, 12% in Washington and 8% in Idaho are not usurious.

## SPECIFICATIONS OF ERROR

### I

The trial court erred in finding that portion of Finding of Fact No.(1) as follows:

> "The sole owner of the stock of the defendant, Hughes Homes, Inc., also owned all of the stock of Hughes Homes Acceptance Corporation." (R.50)

The record shows only that Hughes Homes, Inc., owned all the stock of Hughes Homes Acceptance Corporation (R.Tr.20). (See, too, Anaconda Building Materials Co. v. John N. Newland, Trustee, 9th Cir., 336 F.2d 625)

### II

The trial court erred in finding that portion of Finding of Fact No.(3) as follows:

> "It seems clear that Mrs. Nelson made the initial sale in the residence of the plaintiffs in the State of Idaho....." (R.50)

Negotiations for the sale of the package home took place in both Washington and Idaho between Mrs. Nelson, the realtor and agent for Hughes Homes, Inc., for sale of package homes, and Edgars (R.Tr.9-10, 12). The contract was executed in Washington (R.46; Def.Ex. 4) and the package home was delivered to Edgars in Montana (R.46; R.Tr. 12-13).

III

The trial court erred in finding or concluding that portion of Finding of Fact No. (3) as follows:

> ".....The execution of the note and mortgage in Washington was a mere matter of convenience and did not evidence any intent that the laws of Washington were to govern....." (R.50-51)

> ".....but I am excluding any consideration of Washington law as I am satisfied the parties had no intention to be governed by the law of the State of Washington." (R.52)

> "While the execution of the instruments took place in the State of Washington, this was purely for convenience and does not change the legal effect. It is certainly clear that no one expected the Washington law on interest limits to apply." (R.54)

The execution of the note and mortgage was in fact accomplished in Washington and as a natural result of the presence there of defendant's agent as a resident of Washington and with a place of business in Washington and Edgars' habit of doing business in Washington (R.Tr. 6-7, 10). The execution of an instrument and the presence of the parties thereto in a state is a fact and has an important bearing on the intent of the parties. These matters specified are actually conclusions of law.

IV

The trial court erred in finding that portion of Finding of Fact No. (3) as follows:

> "Mrs. Nelson, a licensed real estate broker in the State of Idaho, was charged with knowing the maximum legal rate of interest chargeable in Idaho." (R. 51)

Appellant is aware of nothing in the Idaho law requiring a real estate broker to know the maximum legal rate of interest chargeable, and finds nothing in the record to show that the real estate broker knew as a fact what the maximum legal rate of interest chargeable in Idaho in various transactions was.

V

The trial court erred in finding that:

"It is conceded by the parties that, if the Idaho law applied, the contract on its face is usurious." (R.52)

A note and mortgage executed in the State of Washington, the note bearing and the mortgage securing 10% interest, in the light of the fact that the maximum legal rate of interest in Washington is 12% per annum (Def. Exs. No. 1 & 2; R. 46-47), cannot constitute a contract which is on its face usurious. Appellant does concede that the maximum legal rate of interest in Idaho is 8% per annum and that the note exceeds such maximum Idaho interest rate.

VI

The trial court erred in the following finding:

"Initially, it is conceded that a 10% charge is usurious in Idaho and that such a charge was made." (R. 54)

The note reserves 10% interest, and the record is conclusive that there was never more than 8% interest charged (R.47; Def.Ex.6).

VII

The trial court erred in finding and concluding as follows:

> "The papers were prepared by defendant's agent, who, as a licensed real estate broker, knew, or should have known, that the contract exceeded the allowable interest rate in Idaho....." (R.54)

There is no substantial evidence in the record that the real estate broker prepared the note and mortgage and there is no substantial evidence that the real estate broker knew, or should have known, what the allowable interest rate in Idaho was, or knew, or should have known, what jurisdiction governed the interest rate of the transaction. If any knowledge is chargeable to the real estate broker, it more reasonably should be that the real estate broker thought the law of Washington, the place of making, with its 12% maximum legal interest rate applied.

VIII

The trial court erred in finding or concluding as follows:

> ".....The defendant knew the interest to be improper as evidenced by the fact that on defendant's books the interest on each payment was charged at a rate of 8% (legal in Idaho)." (R. 54)

The charging of 8% interest does not support an inference that defendant, Hughes Homes, Inc., had knowledge that the interest rate provided by the note was improper, and on the contrary, the charging of only 8% interest negatives a corrupt intent, and supports a more reasonable inference that Hughes Homes, Inc., desired to follow a policy of uniformity among transactions which resulted in Idaho real property securing

obligations owing it.

IX

The trial court erred in the following finding:

> "The plaintiffs were even charged 'late charges' for delayed payments, all based on the 10% interest amortization schedule of the contract." (R. 54-55)

This finding appears to be immaterial except as the trial judge may have felt it supported an inference of a corrupt and usurious intent. The late charges were noted to the extent of five $1.00 charges over a period of about six months, and in fact were not collected or charged except to the extent of a few cents. (Def.Ex.6) The mortgage provided that late charges could be collected if payments were not received when due (Def. Ex. 2). The late charges noted and partially collected were all done during the time the Hughes Homes Acceptance Corporation was the owner and holder of the note and mortgage, and no corrupt or usurious intent can, in any event, be charged to Hughes Homes, Inc., the original payee and mortgagee.

X

The trial court erred in finding or concluding as follows:

> "I conclude that the intent to evade the usury laws of Idaho is clearly shown." (R.55)

There is no substantial evidence that there was an intent to evade the usury laws of Idaho. To so find is clearly erroneous. To so conclude is an incorrect interpretation of the law.

XI

The trial court erred in finding and concluding as follows:

"The contract was usurious and plaintiffs are entitled to judgment. The usury penalty is to be applied." (R.55)

The note and mortgage were not usurious under the law of Washington or Montana, one of which jurisdictions is the law applicable to the transaction through the conflicts of law rules of Idaho.

If the law of Idaho was applicable to the transaction and not Washington or Montana, then the usury penalty of the Idaho statute is not applicable under the Idaho law because there was no corrupt or usurious intent, or intent to evade the law of Idaho, and because, among other reasons, though the instrument reserved 10% interest per annum, there was never any attempt to charge or collect more than 8% per annum, the maximum interest rate allowable under the Idaho statute.

XII

The trial court erred in concluding:

"That the instant case is practically on four square with...."

and controlled by the case of United States Building & Loan Association v. Lanzarrotti, 1929, 47 Ida. 287, 274 P. 630. (R.53, 55)

The conclusion that the Lanzarotti case controls the decision in the case at bar is erroneous because the case at bar is distinguishable in many respects.

XIII

John N. Newland, both as trustee for Hughes Homes, Inc., and as trustee for Hughes Homes Acceptance Corporation.

The judgment in favor of appellees is against the facts and the law.

XIV

The court erred in rendering a judgment against John N. Newland as trustee for Hughes Homes Acceptance Corporation even if appellees were entitled to judgment against Hughes Homes, Inc.

The usury statute should not be extended to include persons not specifically enumerated therein. The note and mortgage were fair on their respective faces, and the acceptance corporation paid valuable consideration upon taking the assignment and had no notice of any usury. The statute penalizes by forfeiture the person who charges a rate of interest in the instrument in excess of the lawful rate. The statute also penalizes the person who is paid such an interest rate. The assignee did neither of these things.

Even if the forfeiture were properly held to affect the assignee through setoff against the assignee's claim as owner of the obligation, it would be error to render a money judgment in excess of any setoff which extinguishes the assignee's claim for principal and accrued interest.

XV

The trial court erred in failing to render judgment in favor of

John N. Newland, as trustee for Hughes Homes Acceptance Corporation, for the balance of the purchase price together with interest at 8% per annum and for foreclosure of the mortgage as sought in the cross-complaint.

The note and mortgage were not usurious, and as stipulated by the parties in the event the usury is not established, Hughes Homes Acceptance Corporation is entitled to judgment for $4,510.48, plus interest thereon at the rate of 8% per annum from April 11, 1964, and attorneys fees of $282.68. (R.47)

## ARGUMENT

A. Conflict of Laws - Idaho

In Whitman v. Green 289 F.2d 566 (9th Cir. 1961), this appellate court analyzed many of the existing decisions of the Supreme Court of Idaho involving Idaho's usury statute and the conflict of laws rules involving usury.

Idaho's usury statutes are set forth in Appendix A, and provide that the taking, receiving, reserving, or charging a rate of interest greater than 8% per annum, when knowingly done, shall result in certain penalties. The statutes further provide that no indorsee in due course of negotiable paper is affected by any usury exacted by any former holder of such paper unless he have actual notice of the usury previous to his purchase.

In the Whitman case, the court was dealing with facts involving a loan of money by a Washington resident to an Idaho resident, evidenced by a note and secured by a mortgage on Idaho property, which instruments

were drawn in Washington, executed in Idaho and delivered in Washington. The 12% per annum interest rate of the note was legal in Washington, but not in Idaho.

In the case at bar, the obligation secured by the mortgage arose out of the sale and purchase of personal property through a contract executed in Washington (Def.Ex. 7; R.46; R.Tr. 12), the personal property was delivered in Montana (R.Tr. 12-13), the note and mortgage on Idaho property executed in Washington (R.46; R.Tr.7) and delivered either in Washington or Montana, and payable in Montana. The note provided interest at 10% per annum (Def.Ex. 1), being the legal maximum in Montana, less than the legal maximum in Washingon, and more than the legal maximum in Idaho (R.47). The mortgagee, the assignee, and finally the trustee in bankruptcy, from the time the first payment was received in Montana never charged, as distinguished from reserved, and never collected more than 8% per annum, the maximum allowed under the Idaho statute. (R.47).

In the Whitman case, at the very outset of the opinion, it was stated:

> "There can be little doubt but that under the weight of authority the law of Washington would be held to control in determining whether the transaction was usurious. See annotation, 125 A.L.R. 487....."

289 F.2d at 567

In view of the Whitman case decision and the reference therein to the annotation in 125 A.L.R. 487. appellant will make only brief reference

to the general principles involved.

The decisions accumulated in the annotation, 125 A.L.R. 487, disclose that the parties to a contract may expressly or impliedly intend that the usury law of a state having a vital contact with the transaction (125 A.L.R. at 482-83) or normal relation to the contract (Seeman v. Philadelphia Warehouse Co. 274 U.S. 403, 71 L.ed 1123, 47 S.Ct. 626; (1927); 125 A.L.R. at 490-91) shall apply and the laws of the place of making and place or performance are mainly the laws considered to have been implied, or by law presumed to apply, as governing the transaction (see also: 16 Am.Jur.2d (Conflict of Laws) Secs. 39, 40). Most of the decisions are concerned with the application of the law of the place which will prevent the transaction from being usurious, and mainly involve the place of making and the place of performance under one of which the transaction otherwise would be usurious (see also: 91 C.J.S. (Usury) Sec. 4 (6)).

In 91 C.J.S. (Usury) Sec. 4 (5), p. 562, the general situation is stated as follows:

> "Generally, the place where the contract is made and the place where it is to be performed are important indicia in the determination of what law the parties intended should govern the contract."

In 91 C.J.S. (Usury) Sec. 4 (6), p. 564, the general rule as to presuming no intent to violate the law is stated:

"Every presumption is against an intention to violate the law so that parties will be presumed to have contracted with reference to the law of the place wherein the transaction would be valid."

The Supreme Court of Idaho applied the law of Utah, the place of making and which was also the place of performance, involving a note and a mortgage on Idaho property, in Winters v. Swift, 2 Idaho 61, 3 P. 15 (1884). The interest rate was in excess of the amount allowed by the Idaho statute.

In Utah State National Bank v. Stringer, 44 Idaho 599, 258 P. 522 (1927), a note executed in Idaho and payable in and sent to Utah where it was accepted, was held to be a Utah note and governed by the usury law of Utah where the interest rate was lawful, and not governed by Idaho law where the interest rate violated the usury statute.

In Zimmerman v. Brown, 30 Idaho 640, 166 P. 924 (1917), it was stated:

"By the great weight of authority it is held that, in a case like the present one, every presumption is against an intention to violate the law, so that, where notes are executed in one state and payable in another, the parties will be presumed to have contracted with reference to the law of the place where the transaction would be valid rather than in view of the law by which it would be illegal, provided, however, that there is no evidence of bad faith or of an intention

to evade the usury law of the latter state, and the contract will be upheld, subject to the condition of good faith just set forth (citing cases)."

"The note in question, although made and executed in Idaho, was made payable in the state of Washington, and the fact that it purported to be dated at Wilbur, Washington shows an intention of the parties that the contract was entered into in view of the laws of that state, and, since there is neither allegation nor proof of bad faith or of an effort to evade the usury laws of this state, the note is not to be deemed usurious." (166 P. 925)

The Zimmerman case, the Utah State Bank case and the Winters case are discussed in the Whitman case. Appellant urges that these Idaho decisions and the Whitman case fully support the proposition that the law of the place of making, that is the State of Washington, or the place of performance, that is the State of Montana, and in either of which the contract would not be usurious, govern the transaction in the case at bar.

B. Bad Faith or Attempt to Avoid Local Law of Usury

At the outset in our discussion of the matters of bad faith or attempt to avoid local law of usury, qualification to the applications of the conflict of laws rules which seek to apply the law which will render the contract non-usurious, appellant presents the cautionary language of the Supreme Court of the United States, stated in Seeman v. Philadelphia Warehouse Co.,

274 U.S. 403, 71 L.Ed. 1123, 47 S.Ct. 626:

".....As thus stated, the qualification, if taken too literally, would destroy the rules themselves, for they obviously are to be invoked only to save the contract from the operation of the usury laws of the one jurisdiction or the other. The effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject....."

274 U.S. 403, at 408

The Zimmerman case, 166 P. at 925, refers to Crawford v. Seattle R. & S. Ry.Co., 86 Wash. 628, 150 P. 1155. In the Crawford case, the Supreme Court of Washington stated:

"It is well settled by the authorities that the parties to a contract may make the same with reference to the laws of any state or country and have their contractual rights governed thereby, provided only that such laws have a real, and not a mere fictitious, connection with the subject-matter of the transaction. It is enough to support this power to contract with reference to the laws of some particular state or country that some of the substantial elements of the contract have

their situs in the state or country the laws of which the parties intend to control their rights under the contract, or may be presumed from the facts and circumstances attending the making of the contract."

150 P. 1155 at 1157

The Washington court in the Crawford case continues on in its discussion and points out that if there is eliminated from consideration the cases that have as their basis an express provision in the contract evidencing the intent of the parties (150 P. at 1157), or have as their basis a situation where, as a matter of law an intention of the parties is determined because all of the elements of the contract have their situs in one state (150 P. at 1158), then the conflict in decisions as to the applicable law is more apparent than real.

The Washington court then held that:

"Where a contract might have been made by the parties thereto with reference to the laws of either one or two or more states, which contract is silent upon the subject of which laws shall govern the rights of the parties thereunder, so far as express language is concerned, and there is fair room for argument that it might have been with reference to the laws of either state, the presumption of lawful intention on the part of the makers of the contract should be controlling and result in giving the contract that construction which will

make it lawful, rather than that which will make it unlawful ....."

150 P. at 1159

The reference in the Crawford case to the intention of parties being determined as a matter of law when all of the elements of a contract have their situs in one state is, appellant asserts, an underlying basis for such decisions as Vermont Loan & Trust Co. v. Hoffman, 5 Idaho 376, 49 P.314; United States Building & Loan Association v. Lanzarotti, 1929, 47 Ida. 287, 274 P. 630. The trial court quoted in the Memorandum Opinion three paragraphs from the Lanzarotti case. The subject matter of the three paragraphs quoted gives a strong indication that one of the principal bases for the application of the Lanzarotti rule to the case at bar by the trial court is the proposition that a foreign corporation doing business in Idaho may not, whether or not it has a corrupt and usurious intent in fact, use the interest rate of its state of incorporation in a note executed by an Idaho resident. (R. 53).

Appellant has previously pointed out in this brief the existence of cases which fall in the category where as a matter of law a particular situs is held to be the governing law because all of the elements of the contract, i.e., the vital contact with the transaction, the normal relation of the elements and the parties are referable to that one situs. The Lanzarotti case is a case of that nature.

The case at bar has some elements which are common to the Lanzarotti case, and its companion cases in principle, Vermont Loan &

Trust Co. v. Hoffman, 5 Ida. 376, 49 P. 314; Cornelison v. United States Building & Loan Association, 50 Ida. 1, 292 P. 243, and those common elements are: (1) the fact that Hughes Homes, Inc., was a foreign corporation with a place of business in Idaho; and (2) a note bearing an interest rate in excess of the legal maximum under Idaho statutes and secured by a mortgage covering Idaho real property. There the similarity ends and the case at bar has elements which involve foreign subject matter, foreign contact, and conduct negativing a corrupt and usurious intent and a purpose to evade Idaho law.

C. Foreign Contact and Subject Matter Referable to Foreign Jurisdictions

Appellees lived some 600 - 700 feet into Idaho from the Washington state line and from Newport, Washington, which is at the state line (R.Tr.6) and had a post office address which was Box 85, Newport, Washington (Def.Ex.4). The agent of Hughes Homes, Inc., was a resident of Newport, Washington, and maintained her office there, and the appellees had previously done business in Washington with the agent (R.Tr. 10). The basis of the transaction between Hughes Homes, Inc., and appellees was the sale by its Washington agent of a prefabricated home through a contract executed in Washington (R.46; R.Tr. 12) after negotiations in Washington and Idaho (R.Tr. 7, 10, 12). The contract provided that delivery of the package home would be made to the appellees at Butte, Montana, and this was done (R.Tr. 12-13; R. 46).

Hughes Homes, Inc., a Montana corporation, was a corporation

authorized to do business in Washington and Idaho (R.45).

If purchase of the prefabricated home was to be financed, the purchase price was to be evidenced by a note and secured by a mortgage or deed of trust covering the real property upon which the home was to be erected (Def.Ex. 4). The agent knew of the intention to erect the home on property in Idaho because in her real estate business she had sold the Idaho property to appellees and had suggested that she sell them a prefabricated home for the property (R.9). Nothing in the record indicates that Hughes Homes, Inc., actually knew where the real property upon which the home was to be constructed was located until the mortgage was executed some twelve days after the sale contract was executed (Def. Ex.4; Def. Ex. 2).

The sale of personal property was the principal aspect of the transaction, and the note and mortgage incidental. The giving of the note and mortgage was contingent upon the buyers not paying cash for the package home. The mortgage being on Idaho real property was further contingent on whether or not the package home was erected on real property in Idaho. (Def.Ex.4)

D. Evidence of Purpose to Evade the Usury Laws of Idaho

The trial court's finding or conclusion that the parties did not intend that Washington law should govern and the trial court's conclusion to exclude Washington law from consideration (R. 50-52, 54; Specification of Error No. III) were erroneous. While there is no specific statement by

the parties in the record as to what law they intended should govern, there is likewise no specific statement by the parties in the record that they did not intend that Washington law should govern. Accordingly, such facts that do appear in the record, such as: the execution of all instruments in the State of Washington (R.46); the delivery and passing of title of the prefabricated home in the State of Montana (R.Tr.12-13; Def.Ex.4); the lawfulness of the 10% per annum interest rate used by the parties under Washington law or Montana law (R.47-48); the presumption of the law to the effect that the parties intend to not violate the law; the fact that there was no discussion as to what amount of interest was involved in Idaho or in Washington (R.Tr. 11); should have led the trial court to conclude that the parties intended the law of Washington to govern their transaction.

An instrument executed in Idaho, but purporting to be executed in Washington, was involved in Zimmerman v. Brown, 30 Idaho 640, 166 P. 924, and the court held that the purported dating in Washington showed an intention that Washington law was to apply.

In this connection, appellant is mindful of the Vermont Loan & Trust Co. v. Hoffman case, the Cornelison case, and the Lanzarotti case, all of which involved foreign corporations doing business in Idaho, making loans to Idaho people and securing the loans by Idaho property, the loans and mortgages being executed in Idaho bearing interest rates in excess of the Idaho statute, and the tenor of such decisions being to the effect that such a foreign corporation cannot have an innocent intent because such a

corporation would then have a right or privilege greater than could be enjoyed by a domestic corporation. (See Vermont Loan & Trust Co. v. Hoffman, 5 Idaho 376, 49 P. 319; Whitman v. Green, 289 F.2d 566) Appellant has previously discussed those cases in this brief. Under such facts as presented in those Idaho cases and with nothing further, it can be fairly assumed that the Idaho statute with its penalties will be applied and no foreign law will be hald to apply and the corporation will not be heard to explain its intent. Those decisions, then, as a matter of law, under such facts exclude the inquiry that the Idaho court would otherwise make to find the presence or absence of a corrupt and usurious intent.

In the case at bar in the light of the foreign contact and the reference of the subject matter to foreign jurisdictions such inquiry should be made.

The inquiry as to the existence or not of a usurious and corrupt intent, and a purpose to evade usury laws of Idaho should be made for two reasons: (1) for the reason that in the absence of a corrupt intent or a purpose to evade the law of the State of Idaho, the law of Washington or Montana should be applied to the transaction; and (2) for the reason that should the transaction be referable to the usury law of Idaho only, then the penalties of the usury statute should not be enforced (Anderson v. Creamery Package Mfg. Co., 1902, 8 Ida. 200, 67 P. 493; Olson v. Caulfield, 1919, 32 Ida. 308, 182 P. 527).

In Anderson v. Creamery Package Mfg. Co., 1902, 8 Idaho 200, 67 P. 493, at 495, the court said:

"Under the authorities above cited, can it be said that John A. Anderson and Mattie Vass knowingly and corruptly entered into the contracts ..... the notes and mortgages ..... with the intent to collect a rate of interest that would be usurious under our statute? We think not." (emphasis added)

The Anderson case quotes the following in the opinion at page 495;

"In Association v. Stanley (Or.) 63 Pac. 495, it is said:

'But notwithstanding the contract appears to be usurious on its face, and the natural inference to be drawn therefrom is that the parties intended the result of their own acts, yet there is another element which must attend the practice of usury. It must be with a corrupt intent, which means that the parties must have knowingly agreed upon a rate of interest greater than that allowed by law. But where they have acted under an honest belief that the stipulated rate was recoverable under the law, in which they were mistaken it has been held that the penalties of usury would not be enforced." (emphasis added)

In Olson v. Caulfield, 1919, 32 Ida. 308, 182 P. 527, at 32 Ida. 312, it is stated:

"It is also true that: When a contract on its face discloses no

appearance of usury, it is presumed to have been made in good faith. And it is for the party who alleges that a corrupt and usurious intent lurks behind such a contract to prove the truth of his allegation." (39 Cyc. 1052; 13 C.J. 779) (emphasis added)

"The law requires that all the facts constituting usury should be proven with reasonable certainty. And evidence which creates in the mind nothing further than a mere surmise, suspicion, conjecture or doubtful inference that the transaction is usurious, or which is intrinsically improbable, is insufficient." (39 Cyc. 1054; 13 C.J. 779)

"The fact at issue in such cases may be determined by inference from all the surrounding circumstances of the case, tending to show the real intent of the parties and the true nature of the transaction in question. Every fact and circumstance in evidence in this case, other than the testimony above quoted as to a conversation had, if at all, some time prior to the actual consummation of the contract, argues strongly against any usurious element in the transaction. Respondent had carried the first loan for nearly five years without collecting any interest. Notwithstanding this, he paid out additional money for taxes on the property, paid up a number of deceased's outstanding obligations, loaned him additional money, and took

a second mortgage on the property. There is certainly nothing which can be gleaned from these circumstances which would indicate any intention on the part of respondent to take any illegal advantage of the deceased."

In Easton v. Butterfield Livestock Co., 1929, 48 Idaho 153, 279 P. 716, the court considered as an important fact bearing on the question of existence of a corrupt intent, the fact that no effort was made to collect illegal interest.

"To constitute usury it is necessary that the excessive interest be 'knowingly' taken, received, reserved or charged. (C.S., Sec. 2553; Anderson v. Creamery Co., 8 Ida. 200, 101 Am.St. 188, 67 P. 493, 56 L.R.A. 554; 2 Page on Contracts, Sec. 964, p. 1708.) When we consider that the opportunity of exacting excessive interest was postponed for the period of more than nine years from the date of the contract, that no effort was made to collect illegal interest, the improbability of the bondholders waiving defaults for nine years in order to collect such interest and that the bonds were offered for sale and sold by the live-stock company after it had either prepared or approved the contract, we cannot say that the contract discloses a corrupt intention on the part of the bondholders to knowingly take, receive, reserve or charge interest at a rate in excess of ten per cent per annum and that all interest earned shall be forfeited

and all payments made applied to the payment of principal."

(emphasis added)

279 P. 716, 719

Specifications of Error IV, VII, VIII and IX involve findings or conclusions pertaining to knowledge or imputed knowledge relative to the Idaho usury statute, knowledge or imputed knowledge that the Idaho usury statute was applicable to the transaction, and interest and late charges made. Such findings appear to be the crux of the trial court's basis for finding or concluding there was an intent to evade the Idaho law.

The trial court's finding that:

"the papers were prepared by defendant's agent, who, as a licensed real estate broker, knew, or should have known, that the contract exceeded the allowable interest rate in Idaho....." (R.54; Spec. of Error VII)

to the extent it refers to the note and mortgage, as distinguished from the contract for the sale of the package home, is not supported by the record. Appellant does not argue that Hughes Homes, Inc., is not chargeable with causing the note and mortgage to be prepared. Under the state of the record it is just as reasonable to guess that the attorney in Washington drew the instruments (R.Tr. 7). The finding that the real estate broker prepared the papers (note and mortgage) seems to have been made to make material the further finding that the real estate broker knew or should have known that the contract exceeded the allowable

interest rate in Idaho. Appellant does not quarrel with the proposition that a real estate broker more likely than not knew the maximum legal rate of interest which may be charged generally in a state, but appellant is unaware of any law requiring a real estate broker to know the maximum legal rate of interest which may be charged and nothing in the record is found to support that knowledge as a matter of fact. Assuming a real estate broker is chargeable with knowledge of the usury statute of a state, it does not follow from that fact that the real estate broker is chargeable with knowledge of the intricacies of the law involved in conflict of laws. If there be any implication as to the knowledge that a real estate broker has or should have relative to a usury statute and the law of what state applies to a transaction, the implication would be that the real estate broker would have in mind the most general or common rules, that is, that the law of the place where instruments are executed or the law of the place of performance of a contract will govern the transaction.

The trial court's finding that:

> ".....Defendant knew the interest to be improper, as evidenced by the fact that on defendant's books the interest on each payment was charged at the rate of 8% (legal in Idaho)." (R.54; Spec. of Error VIII)

involves an unjustified inference drawn from the fact that only 8% interest was charged and collected.

Appellant does not contest the fact that Hughes Homes, Inc., is charged with knowledge that the maximum legal rate of interest in Idaho was 8%, but does contend that at the time of the execution of the note and mortgage transaction, or thereafter, defendant did not know the interest reserved to be improper or usurious.

The fact that from the inception of the payments, which was two or three months after the mortgage was executed (Def.Ex.6), and before which time Hughes Homes, Inc., had unquestionably received the mortgage and note at the home office in Butte, Montana, and was then unquestionably chargeable with knowledge that Idaho property was involved as security, there was charged only 8% interest (and in the light of the fact that Hughes Homes, Inc., had not, in some 50 transactions where package homes were sold in Idaho and Idaho real property became involved as security, exceeded the maximum legal rate of interest provided by the Idaho statute (R.Tr. 17-18, 21)) forcefully negatives any bad faith or intent to evade the usury law of Idaho and it is urged that the only reasonable inferences or conclusions are that no bad faith or purpose to evade the law of Idaho ever existed.

The reserving of 10% interest, with 12% lawful in Washington, 10% lawful in Montana and 8% lawful in Idaho, and the actual charging of 8% from the time of the very first payment suggests many possibilities but does not amount to substantial evidence of, or even tend to support, an inference or conclusion that there was a corrupt intent or a purpose to evade Idaho's usury statute.

More reasonably suggested is that when the sale of personal property transaction culminated in mortgage security in Idaho, and the note and mortgage were received at Butte, Montana, the corporation desired to treat the Edgar mortgage the same interest-wise as the 50 transactions which Hughes Homes, Inc., had consummated in Idaho, which involved sales actually made in Idaho, of prefabricated homes with Idaho mortgages resulting (R.Tr. 17-18, 21).

Another finding which appears to be in part a basis for the finding or conclusion that there was an intent on the part of Hughes Homes, Inc., to evade the usury laws of Idaho is as follows:

> "Plaintiffs were even charged 'late charges' for delayed payments all based on the 10% interest amortization schedule of the contract." (R.54-55; Spec. of Error IX)

The late charges were noted on defendant's exhibit 6, and were only partially assessed. The notations of late charges and partial assessment of the noted late charges was done by Hughes Homes Acceptance Corporation, the assignee. The assignment was made October 10, 1960 (Def.Ex.3) and the trustee was appointed in September, 1961 (R.Tr.23).

Appellant is aware of no other part of the record than defendant's exhibits 2 and 6 pertaining to the late charges. The mortgage, (Def.Ex.2) contains a provision enabling the mortgagee at its option to make a late charge in the event of delayed installment payments. Defendant's exhibit 6 discloses that on five occasions between the dates March 20,

1961, and October 2, 1961, late charges were noted. The five payments credited at $71.37 each as received from March 20, 1961, to and including October, 1961, were actually $72.37 each (See checks No. 107, 105, 133, 148, 169 of Pl. Exs. 8, 9). However, the total of each payment, $72.37, was credited between the interest column, which would include any late charge assessed, and the principal column. A computation of the interest chargeable at 8% per annum during said period approximates within cents the sum of $256.00, and there was in fact charged during said period as interest and late charge the sum of $256.25.

The finding is clearly erroneous to the extent it purports to find that late charges involved were other than a matter of a slight amount of money, to the extent it purports to attribute the assessment of late charges to other than the provision of the mortgage providing for the same or to some corrupt and usurious intent.

The following:

"It is conceded by the parties, that if Idaho law applies, the contract on its face is usurious." (R.52; Spec. of Error V)

and

"The sole owner of the stock of the defendant, Hughes Homes, Inc., also owned all of the stock of Hughes Homes Acceptance Corporation." (R.50; Spec. of Error I)

appear to be material only as they may be necessary to support the judgment against the trustee in his particular capacity as trustee for Hughes

Homes Acceptance Corporation, functioning to charge such assignee with actual or imputed knowledge of usury. (R.58; Spec. of Error XIV).

Appellant contends that a note and mortgage, dated and executed in Washington, carrying 10% per annum interest, the mortgage covering Idaho property, cannot be usurious on its face, even though a court may subsequently determine from the whole transaction that usury was involved. The instruments themselves, not being usurious on the face would give no actual notice of usury to a transferee. There is no evidence in the record to support a finding that the owner of the stock of Hughes Homes, Inc., also owned all of the stock of Hughes Homes Acceptance Corporation; though the record does show that Hughes Homes, Inc., did own all of the stock of the acceptance corporation (R.20; See also: Anaconda Building Materials Co. et al v. John N. Newland, Trustee, Cir. 9, 336 F.2d 625). In the Anaconda Building Materials Co. v. Newland case, this appellate court affirmed the bankruptcy court's instructions to this trustee that the assets of Hughes Homes Acceptance Corporation may not be used to satisfy the claims of the creditors of Hughes Homes, Inc. It was further held in that case that:

> "The executive vice-presidents (of the Acceptance Corporations, including the Idaho Acceptance Corporation) acted independently in the acceptance and approval of mortgage securities,....." (parenthetical added)

The record shows that Hughes Homes Acceptance Corporation was the assignee of the note and mortgage (Def.Ex.3) for valuable consideration. (R.Tr.19) The note and mortgage were fair on their respective faces.

The usury statute (Appendix A) provides that:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by this chapter, when knowingly done, shall be deemed a forfeiture by the person so taking, receiving,reserving or charging to the benefit of the person paying or being charged, of the entire interest which the contract carries with it or which has been agreed to be paid thereon, plus twice the amount of such interest...."

The statute then continues:

"In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back the amount of the interest thus paid from the person taking or receiving the same, plus twice the amount of such interest in addition. No indorsee in due course of negotiable paper is affected by any usury exacted by any former holder of such paper unless he have actual notice of the usury previous to his purchase."

The statute, being quasi penal and providing for forfeiture will not be construed to include matters or persons not expressly enumerated

therein (See: Milo Theater Corp. v. National Theater Supply, 1951, 71 Idaho 435, 233 P.2d 425, at 429). The provision of the statute that an indorsee of negotiable paper is unaffected by any usury exacted by a former holder of such paper unless he have actual notice of the usury previous to his purchase, does not by such express exclusion of an indorsee include in all events an assignee.

The statute does not make the instrument void, and as to an assignee who has not taken or received usurious interest the penalties cannot be enforced (Milo Theater Corp. v. National Theater Supply, 1951, 71 Idaho 435, 233 P.2d 425; Hamilton v. Bill (Texas) 90 S.W. (2d) 929; See: Employees Loan Co. v. Templeton (Texas) 109 S.W.(2d) 774; 91 C.J.S. Sec. 152).

The Idaho statute makes provision for the forfeiture by the person who takes, receives, reserves or charges a rate of interest of the entire interest the contract carries with it or which has been agreed to be paid, plus twice the amount of such interest. If there were usury, Hughes Homes, Inc., would be the party designated in the portion of the statute that would suffer the forfeiture for reserving the rate of interest.

The Idaho statute also makes provision for a penalty to be suffered by the person to whom usurious interest has been paid. Neither Hughes Homes, Inc., nor Hughes Homes Acceptance Corporation were paid usurious interest. (R.47).

If the forfeiture by the payee-mortgagee is deemed to affect the

assignee, which appellant urges is not the law, in any event, there is no legal basis for rendering judgment against the assignee over and above setting off the forfeiture against the claim of the assignee.

E. Review on Appeal and Conclusion

The entire proceedings in this case were submitted to the trial judge upon an agreed statement of facts (R.45-48), the testimony of Wincel T. Edgar (R.Tr.6-13), the testimony of John N. Newland, the trustee (R.Tr.14-23), and the exhibits.

The record is substantially documents or agreed facts, and the slight amount of testimony is undisputed and pertains mostly to facts disclosed by the exhibits or agreed upon. There should be no substantial issue as to the credibility of witnesses.

The trial judge made it very clear in his Memorandum Opinion (R.53,55) that the Lanzarotti case controlled his decision. As appellant has urged, the Lanzarotti case is one wherein it was virtually held as a matter of law that a foreign corporation cannot loan money in Idaho, and reserve and collect interest in excess of the statutory maximum. The Whitman decision of this appellate court indicated to the trial judge that to apply the Lanzarotti rule there must be found both a doing of business in the State of Idaho and a purpose to evade Idaho's usury law. (R.54)

Appellant contends that the true basis of most of the "findings" of the trial judge that this transaction was a doing of business in Idaho

(in the sense that the same excluded consideration of the foreign nature of the transaction) and that there was a purpose to evade Idaho law were inferences drawn from legal standards and erroneously so drawn.

> "In all these cases the inferences drawn from the undisputed facts seem to have been inferences derived from application of a legal standard and not inferences derived from having had 'experience with the mainsprings of human conduct'."
>
> Lundren v. Freeman, Cir. 9,
> 307 F.2d 104, at 115

The conclusions of the trial judge based on application of a legal standard need be given no weight (Lundren v. Freeman).

The finding as a fact that the parties did not intend that Washington law governed the transaction is clearly erroneous. The finding that there was a purpose to evade the Idaho usury law is clearly erroneous. It was error to conclude that Washington or Montana law through Idaho conflict of laws rules did not govern the transaction and to conclude that the transaction was usurious.

It is submitted that the judgment against John N. Newland in both his capacities as trustee for Hughes Homes, Inc., and Hughes Homes Acceptance Corporation should be reversed and that judgment should be rendered on behalf of John N. Newland as trustee for Hughes Homes Acceptance Corporation for the balance of the obligation on the note, and foreclosure proceedings.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

Arnold T. Beebe, Attorney

APPENDIX A

Idaho Code 27-1907. Usury -- Charging -- Penalty -- Indorsee in due course, exception. -- The taking, receiving, reserving, or charging a rate of interest greater than is allowed by this chapter, when knowingly done, shall be deemed a forfeiture by the person so taking, receiving, reserving or charging to the benefit of the person paying or being charged, of the entire interest which the contract carries with it or which has been agreed to be paid thereon, plus twice the amount of such interest. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back the amount of the interest thus paid from the person taking or receiving the same, plus twice the amount of such interest in addition. No indorsee in due course of negotiable paper is affected by any usury exacted by any former holder of such paper unless he have actual notice of the usury previous to his purchase.

APPENDIX B

EXHIBITS

| | | Marked | Admitted |
|---|---|---|---|
| Defendant's Exhibits 1, 2 and 3 | R.Tr. | 2 | 3 |
| Defendant's Exhibit 4 | R.Tr. | 3 | 5 |
| Defendant's Exhibit 5 | R.Tr. | 3 | 5 |
| Defendant's Exhibit 6 | R.Tr. | 3 | 5 |
| Defendant's Exhibit 7 | R.Tr. | 3 | 5 |
| Plaintiff's Exhibits 8 and 9 | R.Tr. | 5 | 5 |